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IN THE

Supreme Court of the United States

October Term, 1964
No. 144

HOMER L. WOXBERG, SR., and WAYNE FRANKLIN DYKES,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

Introductory Statement.

The crux of the questions raised in this matter is whether or not the evidence is sufficient under Count II of the Indictment to constitute a violation of Section 501(c) of the Landrum-Griffin Act where union officials, with the consent of the executive board and pursuant to the authority granted by the governing rules of the local union, paid $220.00 to an accountant for services and cost rendered in auditing and distributing the assets of a trust fund established by the local union for the benefit of its paid employees as a pension plan. Additionally, an important question of appellate procedure is raised. Must the Circuit Court, in pass-

ing on Count II, make a finding on a material question of fact and law raised by the appeal, to wit: the validity of the trust fund known and referred to as the "Severance Fund" for which the payment, the basis of the allegations under Count II, was made?

It is petitioners' position that the Circuit Court must, as a matter of sound appellate procedure and due process of law, make such a finding, which as a matter of law renders the evidence under Count II insufficient under the principle of this Court's decision in *United States v. Carter*, 353 U. S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776 (1957). Petitioners further contend, irrespective of the merits of the above question, that the evidence is insufficient as a matter of law since the payment was made openly and with the approval of the executive board of the local union, which board was empowered by the governing rules of the local to make such expenditures. Therefore, without a *sufficient* showing of fraud, such expenditures, regardless of their impropriety, cannot be the basis for a violation of Section 501(c) as shown by the legislative history and other secondary authority heretofore cited in the Petition.

The United States in its Brief in Opposition has failed to meet head on these issues. Further, Respondent has in part misstated the record in its Statement of the case, which requires this reply by petitioners in order that the record may be correctly stated for this Court's review.

ARGUMENT.

1. Corrections to Respondent's Statement of the Case.

Respondent, in its Statement of the case, misstates the record by asserting that "McBride had never performed any audit service . . . . . ." for the local (R. Br. p. 14). This is not the case. The record is as follows:

> "Q. At the time that the termination took place and the rendering of the bill for $220, of which, as his Honor has pointed out, $44 was for recording, the check which you have before you there, which is a check for $220, that has the word 'arbitration' and it has 'audit.'
>
> Now, you did do an audit, didn't you? A. Yes.
>
> Q. In doing that audit, you, I suppose, were careful to make sure that there was an accurate transfer and that there was a record made of all that was transferred, whether they were trust deeds or cash? A. Yes.
>
> Q. And to whom did you furnish that detailed audit? A. To the trustees. We had a meeting for the distribution, the trustees of the Severance Fund.
>
> Q. All right. That, of course, would be to the secretary of the union and to the president and other officers of the union? A. Yes, I believe all six members were at that meeting.
>
> Q. They were all there? A. Yes." [R. Tr. p. 191, line 23, to p. 192, line 18].

Respondent, in urging the sufficiency of the evidence under Count II, asserts at page 15 of its Brief:

> "There was, in addition, a great deal of other evidence which would have warranted the jury in concluding that, during the entire period in which the Severance Fund was in effect, the existence of the Fund was kept concealed from the rank and file members of the union, including the rank and file members of the executive board.

In support of this conclusion, Respondent cites examples in the record where rank and file members assertedly testified that there had been no mention of the Severance Fund at the general membership meetings (R. Br. Footnote 7, pp. 15, 16). This is not the true state of the record. Each witness called by the Government concerning knowledge of the rank and file members of the existence of the Severance Fund testified *not* that there was no mention ever made of the Severence Fund, but that they had no recollection or memory of whether or not it was ever mentioned at any of the general membership meetings they attended. This is not only true of the witnesses whose testimony in part was cited by Respondent, but also of every witness called by the Government to testify on this question. That this is the record can only be gleaned from a reading of both the direct and cross-examination of each witness who testified on this point. To assist this Court in reviewing this part of the record, we offer the following table of citations to the Reporter's Transcript:

Witness	Respondent's References	Additional Testimony on the Same Point
McBride[1]	R. Tr. p. 237.	R. Tr. p. 248, line 9 to p. 249, line 10; p. 259, lines 3-20.
Wassen	R. Tr. pp. 346, 347, 348.	R. Tr. p. 350, line 9, to p. 352, line 25.
Layman	R. Tr. pp. 512, 515.	R. Tr. p. 561, line 14, to p. 570, line 12.
Ottesen	R. Tr. p. 589.	R. Tr. p. 605, line 13, to p. 607, line 6; p. 612, line 21, to p. 613, line 14.
Logan	R. Tr. p. 633.	R. Tr. p. 638, line 21, to p. 639, line 22.
Carl	R. Tr. pp. 693, 697, 698.	R. Tr. p. 712, line 4, to p. 713, line 19; p. 725, line 14, to p. 745, line 17.
French	R. Tr. p. 2543.	R. Tr. p. 2532, line 14, to p. 2538, line 9.

More significantly, Mr. McConachie, *a rank and file member of the executive board* during this crucial period of time, testified that he had heard of the experience rating refunds and the Severance Fund [R. Tr. p. 2545, line 7, to p. 2558, line 14]. Furthermore, the written record in this case is exactly contrary to the position asserted by the United States, as evidenced by the minutes of both the executive board and the general membership meetings [Exs. 43 and 44, summarized in Petitioners' Statement of the Case, Pet. pp. 8-10].

Thus neither the jury below, the Circuit Court nor Respondent is warranted in concluding that the existence of the Severance Fund was concealed from the rank and file members of the union.

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[1] A member of the union and not the McBride who received the $220.00 payment for auditing and distributing the Severance Fund assets.

2. Respondent Fails to Meet Head On the Questions Raised in This Petition.

Respondent dismisses without authority petitioners' claim that the Circuit Court was required as a matter of sound judicial procedure to rule on the validity of the Severance Fund. Respondent instead argues that because the agreement to terminate the trust specifically provided for the payment of the trust expenses and because the check for the payment of $220.00 was incorrectly described as an "arbitration audit", the evidence is, therefore, sufficient to support the conviction under Count II irrespective of the validity of the trust fund.

Such a contention by Respondent ignores the application of the principle of *United States v. Carter, supra,* which the *Circuit Court admitted would be applicable if they were required to find that the Severance Fund was lawful* [Pet. App. A, p. 19]. Under the principle of the *Carter* case, it would be immaterial whether or not the trust agreement provided for the payment of the expenses of distributing the assets since the local union had a continuing obligation to see that the gross assets were distributed to the beneficiaries of the trust.

Assuming for the sake of argument that the *Carter* case is not applicable, Respondent still fails to demonstrate the sufficiency of the evidence to support the conviction under Count II. Respondent must rely solely on an inference of fraudulent intent drawn from the word "arbitration" which appears on the check, Exhibit 2, on the theory that it was placed there to conceal the

true nature of the payment and an additional inference, for which there is no support in the record, that this word was placed on the check by the secretary, Dorothy Johnson, on orders of petitioners.

We have heretofore demonstrated that there was in fact an audit performed. Considered in this light, together with the testimony of Dorothy Johnson (summarized at page 17 of the Petition), the appearance of the word "arbitration" on the check loses any criminal connotation and fails to meet the standards of sufficiency of the evidence necessary to support the conviction on Count II under the test laid down by this Court in *Glasser v. United States*, 315 U. S. 60, 52 S. Ct. 457, 86 L. Ed 860 (1942), and more recently *Gardner v. Louisiana*, 368 U. S. 157, 82 S. Ct. 258, 7 L. Ed 2d 207 (1961). Is it, under these circumstances, reasonable to infer a fraudulent concealment merely because the word "arbitration" appears on the check? Furthermore, where in the record is there *any evidence* to support a finding that these words were placed on the check, Exhibit 2, on orders of petitioners or under their direction?

Respondent has failed to adequately answer either of these two questions. The most that can be said is that the expenditure was not a proper union expenditure in light of the requirement that these expenses be paid out of the trust assets under the agreement to terminate the trust, Exhibit G. But this is not, we respectfully submit, criminal conversion under Section 501(c).

Conclusion.

For the reasons stated here and in the Petition, a Writ of Certiorari should be issued to the end that these questions may be answered.

Respectfully submitted.

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